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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 760

VILLAGE OF MAYWOOD, a municipal corporation,
Petitioner,

v.

ILLINOIS COMMERCE COMMISSION and
NORTHERN ILLINOIS GAS COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondents, the Illinois Commerce Commission and Northern Illinois Gas Company (Northern Illinois), pray that this Court deny the Writ of Certiorari sought by Petitioner, the Village of Maywood, Illinois, to review the judgment of the Supreme Court of Illinois rendered November 30, 1961 in *Village of Maywood v. Illinois Commerce Commission*, 23 Ill. 2d 447, 178 N.E. 2d 345.

Opinions Below

The judgment of the Supreme Court of Illinois affirmed a judgment of the Circuit Court of Cook County, Illinois, (Abst. 9) which, in turn, had affirmed an order of the Illinois Commerce Commission. (Abst., 1-6) permitting Northern Illinois' Standard Contract Rider 7 to become

effective as part of Northern Illinois' rate schedule for gas public utility service. This Rider provides: "Where the Company pays to a municipality, under a franchise ordinance, a percentage of its revenues for gas service furnished to customers therein, charges for service under the rates provided in this Schedule shall be increased by a percentage which shall enable the Company to recover from such customers the amount paid to the municipality as compensation under the franchise ordinance." (Abst. 7)

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Section 1257(3). Respondents believe that this Court does not have jurisdiction because this case does not necessarily involve a decision which denied a right claimed by Petitioner under the Constitution of the United States and also because the right claimed under the Constitution was not adequately raised below. These matters are discussed at Argument, Parts I and III, respectively.

Question Presented

If this Court has jurisdiction, the question presented is whether or not the Illinois Commerce Commission may, in a rate-making proceeding under the Illinois Public Utilities Act, permit a public utility to recover from its customers in a municipality the franchise fee paid by the public utility under the municipality's franchise ordinance where the ordinance itself is silent on the subject (Abst. 87-104) and the public utility has a uniform rate schedule for a territory which includes 197 municipalities (Abst. 25, 26).

Petitioner's only contention in this Court is that the order of the Illinois Commerce Commission constitutes an impairment of a contract obligation under the franchise

ordinance, in violation of Article 1, Section 10, Clause 1 of the Constitution of the United States.

Statement of Facts

The facts as set forth in the Petition are substantially correct. However, it should be noted: (i) that Northern Illinois is making and proposes to continue making its required payments to the Village of Maywood under the franchise ordinance (Abst. 31, 52), (ii) that the franchise ordinance is silent on the question of where Northern Illinois is to obtain the funds to make its franchise payments to the Village of Maywood (Abst. 87-104) and (iii) that there is nothing in the record which indicates that, at the time the Muncipal Gas Company, predecessor in interest to Northern Illinois, obtained the Maywood franchise, it was furnishing gas service in any other municipality (Abst. 31).

Argument

I. This Court does not have jurisdiction because Petitioner's claim can be disposed of entirely as a matter of state contract law.

Northern Illinois recognizes and is meeting its obligations under the franchise ordinance of the Village of Maywood. The payments required to be made under the ordinance are being made and will continue to be made (Abst. 31, 52). They are not affected by the order of the Illinois Commerce Commission. This is undisputed.

The franchise ordinance says nothing about the source of funds to be used for the payment of the franchise fees (Abst. 87-104). The Village does not contend that this matter is covered by any other evidence.

Petitioner's claim in this Court that the franchise ordinance has been impaired can be disposed of entirely on the ground that the ordinance does not embrace the source of funds to be used by the public utility for the payment of the franchise fees. *Grand Trunk Ry. v. Railroad Comm'n.*, 221 U.S. 400, 403-04 (1911).

Moreover, there is nothing in the record to indicate that, at the time the Maywood franchise was granted to the Municipal Gas Company, predecessor in interest to Northern Illinois, that company was furnishing gas service in any community other than Maywood. Clearly, if the Village of Maywood was the only community served by the public utility, there would be no source of funds for the franchise fees other than the revenues received from the public utility's customers in the Village of Maywood. This is a further basis for concluding that the order of the Illinois Commerce Commission cannot be said to have impaired the franchise ordinance.

On either of the foregoing grounds there is an adequate, independent basis in state contract law on which the court below could have disposed of Petitioner's claim and this Court is therefore without jurisdiction. *Johnson v. Risk*, 137 U.S. 300, 306-09 (1890); *Lynch v. New York*, 293 U.S. 52 (1934).

II. The Commission's order can override the franchise ordinance without violating the Constitution of the United States.

Even if it is assumed that the franchise ordinance forbids Northern Illinois to recover the franchise payments from its customers in the Village of Maywood, the State of Illinois, acting through a rate-making order of the Illinois Commerce Commission under the Illinois Public Utilities Act, *Ill. Rev. Stat.*, c. 111⅔, §§35-38, may override this aspect of the ordinance and permit Northern Illinois to add a charge for the franchise payments to its bills for gas service rendered in the Village of Maywood. This order of the Illinois Commerce Commission is an exercise by the State of Illinois of its police power which the franchise ordinance could not, in advance, defeat. *Milwaukee Elec. Ry. and Light Co. v. Railroad Comm'n.*, 238 U.S. 174, 180-84 (1914); *Midland Realty Co. v. Kansas City Pow. & Light Co.*, 300 U.S. 109, 113-14, *rehearing den.*, 300 U.S. 687 (1937), since it is well settled that the Illinois Commerce Commission, acting under the Illinois Public Utilities Act, may change the rates set by a municipal franchise ordinance even if the franchise ordinance was enacted and accepted before the enactment of the Illinois Public Utilities Act. *Public Utilities Comm'n. v. Quincy*, 290 Ill. 360, 362-70, 125 N.E. 374, 375-78 (1919); *Hoane v. Chicago & Oak Park Elec. R.R.*, 294 Ill. 413, 417-22, 128 N.E. 587, 589-91 (1920).

III. This Court does not have jurisdiction because Petitioner's alleged federal right was not adequately raised below.

Petitioner's claim that the Illinois Commerce Commission's order impairs the obligation of Petitioner's franchise ordinance in violation of Article 1, Section 10, Clause 1 of the Constitution of the United States was not adequately raised in the courts below and therefore cannot form the basis for this Court's jurisdiction of this case.

This Court does not have jurisdiction to pass upon the alleged denial of a federal right in a state court if the claim of federal right was not raised in the state court in accordance with the reasonable requirements of the state's legal procedure. *Louisville and Nashville R.R. v. Woodford*, 234 U.S. 46, 51 (1914).

There are no detailed pleadings in Illinois practice either on appeal from a decision of the Illinois Commerce Commission to a Circuit Court or on the subsequent appeal from the decision of the Circuit Court to the Supreme Court of Illinois. While the briefs in the Supreme Court of Illinois are not part of the record before this Court, it may be proper to refer to them to ascertain whether or not the federal right was properly asserted below.

In Paragraph 5 of its petition for rehearing before the Illinois Commerce Commission, Petitioner did say that Northern Illinois' Rider 7 would impair the terms of the franchise ordinance in violation of Article 10, Section 1, Clause 1 of the Constitution of the United States and in violation of Article II, Section 14 of the Constitution of Illinois. (Abst. 76). This is the only specific reference to the contracts clause of the Constitution of the United States in the entire record and in the briefs before the Supreme Court of Illinois. No briefs were filed in the Circuit Court of Cook County.

At pages 3 and 28 and 29 of Petitioner's brief before the Supreme Court of Illinois, references are made to a claimed impairment of a contractual obligation but no citations are given and the references could as easily be deemed to be addressed to the proper interpretation of the franchise ordinance as to a constitutional argument. Moreover, the Constitution of Illinois forbids the impairment of contracts by the state and Petitioner's impairment of contract argument, if such an argument were made, could as well have been under the Constitution of Illinois as under the Constitution of the United States. As this Court stated in *Lynch v. New York*, 293 U.S. 52, 54 (1934), "... jurisdiction cannot be founded upon surmise."

Rule 39 of the Supreme Court of Illinois, in relevant part, provides:

> Briefs. . . .
>
> II. The Points and Authorities shall consist of the propositions relied upon in support of the appeal with citation of authorities. . . .
>
> IV. The Argument shall be limited to the points made and cases cited in the Points and Authorities, and in the sequence in which the points are made. A point made but not argued may be considered waived. . . .
>
> No alleged error or point not contained in the brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing. . . . *Ill. Rev. Stat.* c. 110, 101.39.

Petitioner's claim under the contracts clause of the Constitution of the United States was not mentioned in the Points and Authorities section (pp. 5-6) of its brief before the Supreme Court of Illinois. Under Rule 39, as set forth above, Petitioner was precluded from thereafter raising the

claim in that court either on oral argument or on petition for rehearing, and the court was precluded from considering it. *People ex rel. Carpentier v. Treloar*, 13 Ill.2d 596, 601, 150 N.E.2d 624, 626 (1958).

The opinion of the Supreme Court of Illinois makes no mention of the impairment of contract argument. Had the argument been fairly presented to the Supreme Court of Illinois it is reasonable to believe that it would have received attention. Skilled lawyers represented Petitioner. They could, with ease, have presented openly the constitutional claim they now make. They did not do so.

Surely Petitioner's presentation below of its claimed federal right was not under these circumstances adequate to give this Court jurisdiction. *Lyon Oak Water Users' Ass'n. v. Railroad Comm'n.*, 269 U.S. 354, 356-59 (1926); *Halbert v. Chicago*, 202 U.S. 275, 280 (1906).

IV. The decision of the Supreme Court of Illinois is correct as a matter of rate making.

The decision of the Supreme Court of Illinois in approving the decision of the Illinois Commerce Commission is correct as a matter of rate making. Where a municipality imposes an annual franchise charge upon a public utility and the amount of the charge is not passed on to the public utility's customers in that municipality, an illegal discrimination against customers outside the municipality results if the public utility has a uniform rate schedule as does Northern Illinois. *Elmhurst v. Western United Gas and Elec. Co.*, 363 Ill. 144, 1 N.E. 2d 489 (1936); *Ogden City v. Public Service Comm'n.*, 123 Utah 443, 260 P.2d 754 (1953); *Scottsbluff v. United Tel. Co.*, 171 Neb. 229, 106 N.W. 2d 12 (1960). This was the sole issue below; it is not raised by the Petition for a Writ of Certiorari.

Conclusion

For reasons stated above, Respondents pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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